

UNITED STATES OF AMERICA	)	
	)	<b>PROSECUTION RESPONSE TO</b>
	)	<b>DEFENSE OBJECTION</b>
	)	<b>(PRESIDING OFFICER &amp;</b>
v.	)	<b>ASSISTANT ROLE ON LEGAL</b>
	)	<b>ADVICE AND INSTRUCTIONS)</b>
	)	
DAVID M. HICKS	)	12 October 2004
	)	

- d. Defense requests that the Appointing Authority (AA) issue guidance to the PO regarding the appropriate role of the Assistant to the PO (APO). Prosecution believes this question is moot in light of the revision to Presiding Officer Memorandum No. 2 (POM 2), published on 16 September 2004. The APO's role is limited to administrative matters and advice to the PO on the procedural functions allocated to the PO under commission law.<sup>1</sup>

<sup>1</sup> “Commission Law” as used in this motion response refers to the President’s Military Order (PMO) of November 13, 2001, and the orders, directives and instructions issued by the Secretary of Defense and the DoD General Counsel pursuant to the PMO.

e. Defense requests that the AA respond to Interlocutory Question No. 4 “by informing the PO that he does not instruct on law or attempt to influence” the Commission on matters of law to be decided by the Commission as a whole. The AA has responded to Interlocutory Question No. 4, ruling that the full Commission must adjudicate all issues of fact and law before the Presiding Officer may certify a question to the Appointing Authority. Effectively, the Appointing Authority has denied this Defense request.

3. Facts. On 31 August 2004, the DoD General Counsel promulgated a revision of MCI 8 that clarifies the PO’s authority on matters of law. Likewise, the duties and functions of the APO were clarified by publication of POM 2 (revised) on 16 September 2004. These revisions render the Defense objections moot, as outlined above. It only remains to clarify these matters on the record and to work out the prudential application of these rules.

#### 4. Analysis

Revisions to MCI 8 since the initial hearing in this case render most of the defense objections moot. The role of the PO vis-à-vis the other panel members has been substantially clarified by that revision. The PO has authority to control many aspects of the proceedings of the military commission, but he is not the final authority on the law. He does not have authority to “instruct and advise” on all issues of law. He does, however, “instruct and advise” on all procedural and evidentiary questions that he is responsible for under Commission Law.<sup>1</sup>

The asserted basis of the Defense objections is that the original version of MCI 8 was inconsistent with the PMO and MCO 1, in that it defined PO authority to rule on matters of law more broadly than those orders allowed. In stating its objections, the Defense makes no reference to custom, treaty or any other source of international law. The Prosecution agrees that the issues addressed here do not raise issues of international law.

The President has authorized the trial of certain non-citizens for violations of the law of war and other offenses triable by military commission. His authority for doing so is derived from 10 U.S.C. §821 and §836, and from his constitutional powers as Commander in Chief, acting pursuant to the congressional authorization to use all means necessary to defend the nation.<sup>2</sup> Military Commissions derive their authority and rules of procedure from the orders and regulations that call them into existence.<sup>3</sup> Existing models of judicial procedure, historical practice, and analogies to courts-martial may be useful

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<sup>2</sup> *Authorization for Use of Military Force Joint Resolution* (Public Law 107-40, 115 Stat. 224).

<sup>3</sup> “Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth.” *Madsen v. Kinsella*, 343 U.S. 341, 347-48.

sources of comparative analysis, general principles of law, and practical guidance;<sup>4</sup> but the role and authority of the PO and APO are determined by Commission Law and reasonable inferences drawn from that body of law.

a. The Law Is Determined By the Whole Commission.

The President's Military Order of November 13, 2001 states that the military commission will be "triers of both fact and law."<sup>5</sup> That Order also contemplates that one of the members of the commission will be designated as the "presiding officer."<sup>6</sup> The qualifications, functions and authority of the PO and other members of the commission are not specified and delineated in the PMO, but are expressly left to definition by the Secretary of Defense in subsequent implementing "orders and regulations."<sup>7</sup>

The PMO is broad enough to allow for a range of structural allocations of authority between the PO and other members of the Commission. The original version of MCI 8, dated April 30, 2003, stated: "The Presiding Officer shall generally adjudicate all motions and questions that arise during the course of a trial by military commission."<sup>8</sup> While this formulation is arguably consistent with the PMO, the revised version is unquestionably so and renders the Defense objections on that basis moot. The revision of MCI 8, dated 31 August 2004, makes it clear that the substantive law of the case and disputed issues of law arising at trial must be determined by the Commission as a whole: "Except for determinations concerning protection of information...and the probative value of evidence, the full Commission shall adjudicate all issues of fact and law in a trial."<sup>9</sup>

b. The PO Is Not Authorized to Instruct the Commission on Substantive Law.

The Defense argues vigorously for equal authority among and between all members of the Commission in deciding issues of law before the Commission. With the promulgation of revised MCI 8, the Defense view has been adopted. The Prosecution agrees that this procedural arrangement will allow for a full and fair trial.

Under current Commission Law, including the revision of MCI 8, the PO does not have independent authority to make rulings of law, to give authoritative instructions on the law, or formally to advise Commission members on the substantive law of the case. The Prosecution agrees that current Commission Law requires the entire Commission to vote on and determine all issues of law presented to the Commission for decision. It is equally clear under Commission Law that the Presiding Officer does have express

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<sup>4</sup> See Part I (Preamble) of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002), states: "*Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.*" ¶2(b)(2)(emphasis added).

<sup>5</sup> President's Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001)(*hereinafter* PMO) §4(c)(2).

<sup>6</sup> *Id.* §4(c)(3).

<sup>7</sup> *Id.* §4(b).

<sup>8</sup> MCI No. 8, dated 30 April 2003, ¶4.A. This was further echoed in ¶5, which stated: "The Presiding Officer shall rule on appropriate motions or, at his discretion...may submit them to the commission for decision or to the Appointing Authority as a certified interlocutory question."

<sup>9</sup> MCI No. 8, ¶5.

authority to preside over the proceedings of the military commission and to give procedural and administrative instructions necessary for the expeditious and efficient trial of cases before the commission.<sup>10</sup>

In courts-martial, federal courts and other systems which separate the functions of judge and jury, an instruction procedure is necessary to allow the judge to impart binding legal rules to the finders of fact.<sup>11</sup> An “instruction” in this sense is defined in Black’s Law Dictionary as a “direction given by the judge to the jury concerning the law of the case; a statement made by the judge to the jury informing them of the law applicable to the case in general or some aspect of it; an exposition of the rules or principles of law applicable the case or some branch or phase of it, which the jury are bound to accept and apply.”<sup>12</sup> Instructions merely give voice to judicial determinations of the law. In other words, they are an attribute of judicial authority and ancillary to the authority to make rulings on the law. Because the functions of judge and jury are combined, no one member has final authority to “instruct,” “inform,” “advise,” or “direct” the others on disputed matters of law.

Members of the Commission function as a panel of judges on matters of law.<sup>13</sup> Under this arrangement, authoritative instructions on the law by the PO are inappropriate. It is a fundamental function of the Commission *as a whole* to deliberate upon and make findings on the law. Since neither the PO nor any other member has individual authority to pronounce what the law is, no individual member of the Commission is vested with authority to give instructions.

Hence, the PO must refrain from “instructing” members on disputed issues of substantive law in motions practice or in defining crimes and defenses pertinent to the case. This limitation on PO instructions becomes manifestly reasonable when the precise duties of the PO are more fully articulated.

c. The PO Has the Power to “Preside” Over Commission Proceedings.

It is evident from the President’s Military Order that he envisioned the commissions to be guided in their functions by a “Presiding Officer.” It is certainly reasonable to say that the President expected the PO to preside over and control the proceedings of the commissions, leaving the precise scope and limits of that authority to implementing regulations. However, it cannot be doubted that it was the intent of the President and Secretary of Defense that the PO have special duties and the powers to carry them into execution. That much is implicit in the very term “*Presiding Officer*.”

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<sup>10</sup> MCI No. 8, ¶5.

<sup>11</sup> R.C.M. 801(a)(5) requires the military judge in courts-martial to “instruct the members on questions of law and procedure which may arise.” *See also* Fed.R.Crim.P. 30.

<sup>12</sup> BLACK’S LAW DICTIONARY 856 (6<sup>th</sup> ed. 1997). It further notes “Attorneys for both sides normally furnish the judge with suggested instructions. Fed.R.Civil P. 51; Fed.R.Crim.P. 30. many states and federal courts have model or pattern jury instructions which are required to be used, or substantially followed by the trial judge.”

<sup>13</sup> “[T]he full Commission shall adjudicate all issues of fact and law in a trial.” MCI No. 8, ¶4A.

In DoD Military Commission Order No. 1 (MCO 1), the Secretary of Defense specifies qualifications of all members of the commission and further defines the unique role and qualifications of the PO. The PO is to be a member of the commission, but must possess the legal qualifications of a judge advocate.<sup>14</sup> These qualifications enable the PO to carry out his unique functions, which include, *inter alia*, control of proceedings to ensure a full and fair trial;<sup>15</sup> rulings on the admission or exclusion of evidence;<sup>16</sup> closure of the proceedings;<sup>17</sup> certification of interlocutory questions;<sup>18</sup> scheduling hearings;<sup>19</sup> supervising discovery and production of evidence;<sup>20</sup> issuing protective orders;<sup>21</sup> announcing the findings and sentence of the commission;<sup>22</sup> and regulation of the examination of witnesses.<sup>23</sup> Recognizing the need for further definition of roles and procedures, the Secretary expressly anticipated the need for further implementing regulations to be promulgated by the authority of the DoD General Counsel.<sup>24</sup>

The DoD General Counsel has further specified the functions and authority of the PO in MCI 8. The PO has authority to conduct or permit the questioning of commission members for purposes of voir dire,<sup>25</sup> and to forward information and recommendations relevant to removal for cause of any member to the Appointing Authority.<sup>26</sup> In certifying interlocutory questions to the Appointing Authority, the PO shall decide what materials should be forwarded to the AA and whether the proceedings should be held in abeyance pending the AA decision on the question.<sup>27</sup> The PO is empowered to manage the filing of motions and charged with ruling on motions to compel discovery and disclosure of witnesses.<sup>28</sup>

Consistent with the PO's general duty to control the proceedings to ensure a full and fair trial, and consistent with the unique legal qualifications of his office, MCI 8 authorizes the PO to "ensure the execution of all ancillary functions necessary for the impartial and expeditious conduct of a full and fair trial by military commission."<sup>29</sup> According to MCI 8, para. 5, examples of these ancillary functions include scheduling commission hearings, administering oaths, conducting *in camera* meetings with counsel, and "providing necessary instructions to other commission members."<sup>30</sup>

Taken together, while the full Commission decides issues of law, the Presiding Officer has substantial responsibility to conduct and control the proceedings. This

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<sup>14</sup> MCO No. 1, ¶ 4.A.(4).

<sup>15</sup> *Id.* ¶4.A.(5)(b)

<sup>16</sup> *Id.* ¶ 4.A.(5)(a)

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* ¶ 4.A.(5)(d).

<sup>19</sup> *Id.* ¶ 4.A.(5)(b).

<sup>20</sup> *Id.* ¶ 5.H. & 6.A.(5).

<sup>21</sup> *Id.* ¶ 6.D.(5).

<sup>22</sup> *Id.* ¶ 6.E(9).

<sup>23</sup> *Id.* ¶ 6D(2)(c).

<sup>24</sup> *Id.* ¶ 7A.

<sup>25</sup> MCI 8, ¶ 3A(2)

<sup>26</sup> *Id.* ¶ 3A(3).

<sup>27</sup> *Id.* ¶ 4.

<sup>28</sup> *Id.* ¶ 6A.

<sup>29</sup> MCI 8, ¶5.

<sup>30</sup> *Id.*

authority implements the President's intent to ensure a full and fair trial under the control of a PO and the Secretary's intent to vest the PO with special legal powers sufficient to ensure a full and fair proceeding. The powers given to the PO in implementing instructions and orders are not inconsistent with the PMO. Rather, they offer specificity and clarification and enable the PO to preside over the proceedings.

d. The Power to Preside Includes the Power to Instruct On Appropriate Matters.

In order to fulfill his duties and functions, the PO will necessarily have to provide direction and instructions to counsel and other members of the Commission in the course of proceedings before the Commission. While he will not give instructions on substantive law of crimes and defenses or disputed points of law in motions practice, Commission Law gives the PO responsibilities and authority reasonably necessary to carry them out. MCI 8 expressly lists among the implied duties of the PO "providing necessary instructions to other commission members."<sup>31</sup>

Commission Law does not specify the kinds of instructions that the PO will find necessary. However, such instructions logically fall into several categories. First, the PO will give any administrative instructions to members of the commission regarding scheduling of the time and place of hearings, uniform of the day, security measures and their effects on the proceedings, limits on the movement of members within the hearing site, and other similar matters. These are very basic instructions that serve to assemble the Commission and to ensure its efficient and impartial functioning, which is one of the PO's core functions.

A second category of instructions that the PO might deem necessary for a full, fair and expeditious trial include cautionary instructions to preserve the impartiality of the members, such as an instruction regarding pretrial publicity, reference to sources of information outside of Commission hearings, and direct contact with news reporters.

A third category of necessary instructions might address procedural matters at trial and what could be termed "trial mechanics." These instructions would include the recitation of procedural rules under Commission Law, such as the order of trial, method of proceeding in motions practice, voting procedures, and the like. Instructions on deliberations should include recitations of Commission Law relevant to that function, such as the presumption of innocence and burden of proof. It is reasonable to assume that the PO will instruct members on a procedure for questioning of witnesses by the members, for requesting a vote of the full commission on a PO ruling to exclude evidence, and the meaning and effect of any other decision made by the PO pursuant to his authority under Commission Law as outlined above (e.g., the closure of proceedings, exclusion of the accused, or admonishment of counsel.)

Commission Law entrusts the PO with responsibility to preside over the proceedings to ensure a full, fair and expeditious trial. While he lacks the comprehensive authority that a military or federal trial judge has to rule on legal issues, he has the critical responsibility to rule on admissibility of evidence, manage the trial administratively,

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<sup>31</sup> MCI No. 8, ¶5.

perform specific procedural functions and to take any other action necessary to fulfill his role.

e. The PO May Present His Views on the Law in Deliberations.

The orders and regulations governing the military commissions do not provide for a “legal advisor” to the commission, but they do require that the PO possess legal qualifications as a Judge Advocate. The PO’s authority to preside and execute his specified functions does not confer broad authority to act as a general legal advisor to the Commission on disputed issues of law or the substantive law of crimes and defenses. Resolution of those matters is for the entire Commission. However, his legal training and experience benefits the Commission in several ways and are an asset to the Commission in providing a full and fair trial for the Accused.

As may any member of the Commission, the PO may question witnesses, call witnesses, and ask counsel for their views on the law. His legal training and experience will assist the Commission in sharpening issues before the Commission, pursuing relevant lines of inquiry with witnesses, focusing counsel on issues during motions and argument, and analyzing the need for additional evidence on material issues. The PO may summon witnesses, order the production of evidence, and designate special commissioners to take evidence.<sup>32</sup>

Under Commission Law, the PO is a voting member of the Commission.<sup>33</sup> As such, he is to participate fully in the deliberations and voting on all issues of law and fact. Like any member, he is expected to bring his common sense, reasoning ability and knowledge of the ways of the world to bear on those deliberations.<sup>34</sup> By requiring the PO to have legal qualifications and also making him a voting member of the Commission, MCO 1 clearly contemplates that the Commission will benefit from the general legal knowledge and training of the PO. This is inherent in the structure of the Commission. Like other members, he may refer to the legal materials in Commission Law (e.g., MCI 2 for elements of offenses) and any matters presented by counsel on the record. Like judges in all systems, members of the panel may examine any legal authorities relevant to issues that arise in litigation. Undoubtedly, his legal training and experience will enable him to assist other members of the Commission in the process of deliberation about legal issues.

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<sup>32</sup> See MCO No. 1, ¶ 6A(5). This provision empowers the Commission as a whole to summon witnesses, order production of evidence, and designate special commissioners to take evidence. As to these functions, it states: “The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer’s own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial...”

<sup>33</sup> *Id.*, ¶4A(4).

<sup>34</sup> See “Trial Guide for Military Commissions” (draft of 23 Aug 2004): “**PO:** Bear in mind that only matters properly before the Commission, as a whole will be considered. In weighing and evaluating the evidence we will use our common sense, and our knowledge of human nature and the ways of the world. In light of all the circumstances in the case, we will consider the inherent probability or improbability of the evidence. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests with us.” This instruction is taken substantially from the *Military Judge’s Benchbook*, DEP’T OF THE ARMY PAMPHLET 27-9 (15 sep 2002).

His expertise will assist the Commission in resolving issues of law, putting findings in proper form and assisting in drafting essential findings of law and fact, as appropriate.

f. Commission Law Allows Flexibility In Procedures for Making Legal Rulings.

Under Commission Law, the timing and method of ascertaining the law is left to the discretion of the Commission and the adversarial initiative of the parties. If either party seeks a ruling on a substantive law issues relating to crimes, defenses, or other issues of law, such issues may be raised in the course of pretrial motions, during trial, or during findings and sentencing argument.

As “triers of fact and law,” Members of the Commission have the final decision as to what elements of proof are required to prove each offense. Prior to presentation of the case on the merits it would be appropriate for the PO to offer preliminary instructions, including trial procedures and notice regarding the elements of offenses to be tried. This public declaration of the elements on the record, and in the presence of the accused and counsel, serves the interests of a full and fair trial. The “Trial Guide for Military Commissions” (Draft of 23 Aug 2004), includes a procedure for such notice as part of the preliminary instruction phase of trial on the merits.<sup>35</sup> This procedure implies the necessity of making conclusions of law on the elements of offenses charged and any anticipated affirmative defenses prior to trial on the merits. The Commission may permit filing of briefs and argument of counsel on these issues, as necessary.

The Prosecution recommends the same approach with respect to motions. Counsel for each side present their point of view through written briefs and oral argument. The members then enter into closed conference to make conclusions on the law. Each member in the closed conference has equal voice and need not give greater or lesser weight to the opinion of the PO. The PO then announces the members’ conclusions of law in open court. Either side may request the Commission issue conclusions of law and factual findings for the purpose of establishing a record for appellate review.

At the conclusion of the trial, counsel may each argue their view of the facts and any applicable law. The Commission as “triers of both fact and law” then renders its verdict.

g. The Assistant to the POs May Assist the PO In Executing His Functions.

Authority for the appointment of an Assistant to the POs (APO) is found in MCO 1, para 4D: “Other personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks may be detailed or employed by the Appointing Authority, as necessary.” Additionally, DoD Dir. 5105.70 empowers the AA to “appoint any other personnel necessary to facilitate military commissions.”<sup>36</sup> Given the scope and nature of the PO’s duties outlined above, it is entirely appropriate to detail an assistant to ensure the smooth operation of the Commission.

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<sup>35</sup> “Trial Guide for Military Commissions,” p. 22-23 (Draft of 23 Aug 2004).

<sup>36</sup> DoD Dir. 5105.70, ¶4.1.1



As stated in section a above, the PO does not have independent authority to make rulings of law, to give authoritative instructions on the law, or independently to advise Commission members on the substantive law of the case. Accordingly, the APO has no role in those matters either. Rather, the APO serves as an assistant to this and any future POs on functions that are expressly allocated to the PO under Commission Law. POM 2-1, dated Sep 16, 2004, sets forth the nature and scope of the APO's duties. In summary, the APO will assist the PO in all aspects of his duties as an attorney-advisor. However, the POM states categorically that the APO is "*not* authorized to...Provide any substantive advice to the Presiding Officer on any matter that would require a vote or decision by the entire Commission. This prohibition includes any advice on findings, sentence, or motions or requests which require a vote by the commission."<sup>37</sup> This change has been published since the Defense raised its objections; the redefined roles of the PO and APO appear to allay the concerns raised.

5. Legal Authority.

- a. President's Military Order of November 13, 2001.
- b. Manual for Courts-Martial (2002).
- c. Military Commission Order No. 1
- d. Military Commission Instruction No. 8
- e. DoD Dir. 5105.70
- f. Federal Rules of Criminal Procedure.
- g. *Madsen v. Kinsella*, 343 U.S. 341 (1952)

//Signed//

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Lieutenant Colonel, U.S. Marine Corps  
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<sup>37</sup> Presiding Officer Memorandum # 2-1, ¶3.d (Sep 16, 2004).